

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DONNIE WAYNE NIPPER,)
)
Petitioner,)
)
v.) 1:16CV867
) 1:04CR434-1
)
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

On November 28, 2018, the United States Magistrate Judge's Recommendation was filed and notice was served on Petitioner pursuant to 28 U.S.C. § 636. (Doc. 113.) On December 18, 2018, Petitioner filed objections (Doc. 115) to portions of the Recommendation and "Emergency Motion to Overrule the Recommendation of the Magistrate Judge and to be Release Immediately" (Doc. 116). Respondent did not file any objections.

The court has reviewed Petitioner's objections *de novo* and finds that they do not change the substance of the United States Magistrate Judge's Recommendation (Doc. 113), which is affirmed and adopted. To the extent there are issues raised with regard to the determination of Petitioner's sentence at resentencing, those issues are best addressed after a supplemental report is prepared by the Probation Office, with an opportunity for

objections by Respondent and by Petitioner, with the assistance of counsel.

IT IS THEREFORE ORDERED that Petitioner's motions (Doc. 105, 106) seeking relief under Federal Rule of Civil Procedure 60 and summary judgment under Rule 56 are denied as moot, Petitioner's motion (Doc. 109) for immediate release is denied, and Petitioner's motion (Doc. 79) to vacate, set aside or correct sentence under 28 U.S.C. § 2255 is GRANTED, as set out in the Recommendation. Petitioner's prior sentence is VACATED, and the Clerk is directed to set this matter for resentencing as soon as practicably possible. Petitioner remains in custody, and the United States Attorney is directed to produce Petitioner for the resentencing hearing. The Probation Office is directed to prepare a Supplement to the Presentence Investigation Report in advance of the resentencing hearing. Counsel shall be appointed to represent Petitioner at the resentencing hearing.

/s/ Thomas D. Schroeder
United States District Judge

December 27, 2018